No. 83-245 & 83-291

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PENSION BENEFIT GUARANTY CORPORATION,
Appellant,

v.

R.A. GRAY & COMPANY,
Appellee.

OREGON-WASHINGTON CARPENTERS-EMPLOYERS PENSION TRUST FUND,
Appellant,

v.

R.A. GRAY & COMPANY,
Appellee.

On Appeal From the United States Court of Appeals
For the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF G & R ROOFING COMPANY AS *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

G & R Roofing Company ("G & R") respectfully moves the Court for leave to file the attached brief *amicus curiae* in support of the position of appellee R.A. Gray & Company.[1] In support of this motion, G & R states:

[1]Pursuant to Sup.Ct.R. 36.3, counsel for G & R requested the consent of counsel for the parties to the filing of a brief *amicus curiae*. Counsel for appellant Oregon-Washington Carpenters-Employers Pension Trust Fund, has refused to consent to the filing of the brief necessitating this motion. Counsel for appellant Pension Benefit Guaranty Corporation ("PBGC") and for appellee R.A. Gray & Company have consented to the filing of the brief.

G & R is a California corporation and a contractor engaged in the building and construction industry. G & R is an appellee and cross-appellant in the consolidated appeal resulting in the opinion of the court of appeals which is sought to be reviewed here. *Shelter Framing Corp. v. Carpenters Pension Trust for Southern California*, 705 F.2d 1502 (9th Cir. 1983).

G & R is a respondent and cross-petitioner in *Carpenters Pension Trust for Southern California v. Shelter Framing Corp.*, Nos. 83-507 & 83-702 (U.S. filed Sept. 26 and Oct. 26, 1983), which seeks review of the same court of appeals decision before the Court in the above-captioned matter as it pertains to appeals consolidated for disposition. G & R was granted permission to file a brief *amicus curiae* with regard to the jurisdictional statement in this appeal.

The court of appeals struck down as unconstitutional the imposition of withdrawal liability on G & R, as well as the other employer parties, Shelter Framing Corporation and R.A. Gray & Company. The withdrawal liability was assessed under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 94 Stat. 1208 (1980), 29 U.S.C. §§ 1381-1461 (Supp. V 1981), for withdrawals from multiemployer pension plans before the enactment date of the statute on September 26, 1980, but after its retroactive effective date of April 29, 1980.

On July 1, 1980, G & R terminated its collective bargaining relationship with the Carpenters' union. On September 2, 1981, the Carpenters Pension Trust for Southern California ("CPT") assessed a withdrawal liability against G & R in the amount of $687,387. The lump sum withdrawal liability totaled forty percent of the company's net worth. If G & R paid the withdrawal liability on an installment basis, the annual liability would represent ninety-four percent of G & R's net income during the 1981 year. *Shelter Framing Corp.*, 705 F.2d at 1506.

The appeal seeks to reverse the court of appeals' decision holding the retroactive imposition of withdrawal liability to be unconstitutional. G & R has an essential and unique interest in the appeal, as G & R was a party to the court of appeal's decision and the record developed by G & R in the district court was part of the record considered by the Ninth Circuit in disposing of CPT's appeal. G & R's request for leave to file the attached brief *amicus curiae* is made in furtherance of that interest.

G & R seeks by the brief *amicus curiae* to support the position of appellee R.A. Gray & Company. G & R will demonstrate to the Court that MPPAA's retroactive application cannot survive constitutional scrutiny on due process grounds, this Court's longstanding decision in *Railroad Retirement Co. v. Alton Railroad Co.*, 295 U.S. 330 (1935), and subsequent decisions of this Court which have considered the constitutionality of retrospective legislation. Because G & R believes that the facts developed by G & R in the district court and their application to the applicable law will not be adequately presented to this Court in reviewing the court of appeals decision it is important that the attached brief *amicus curiae* be considered by the Court.

Accordingly, G & R respectfully requests that the Court grant leave to file the attached brief *amicus curiae*.

Respectfully submitted,

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BRIEF OF G & R ROOFING COMPANY AS *AMICUS CURIAE*

INTEREST OF THE *AMICUS CURIAE*

G & R Roofing Company ("G & R") is an appellee and cross-appellant in the decision of the court of appeals which is sought to be reviewed on appeal here. G & R is also a respondent and cross-petitioner in *Carpenters Pension Trust for Southern California v. Shelter Framing Corp.*, Nos. 83-507 & 83-702 (U.S. filed Sept. 26 and Oct. 26, 1983), which seeks review of the same court of appeals decision before this Court in the above-captioned matter. The petition and cross-petition in Nos. 83-507 and 83-702 together present a comprehensive challenge to the constitutionality of the Multiemployer Pension Plan Amendments

Act of 1980, 94 Stat. 1208 (1980), 29 U.S.C. §§ 1001-1461 (Supp. V 1981) ("MPPAA"). *Carpenters Pension Trust for Southern California v. Shelter Framing Corp.* is still pending before this Court. G & R has already appeared as an *amicus curiae* in this case with regard to the consideration of the jurisdictional statements.

A claim for withdrawal liability has been assessed against G & R in the amount of $687,387. With regard to G & R, the trial court declared and the court of appeals affirmed that the retroactive imposition of withdrawal liability against G & R and another employer, Shelter Framing Corporation, under MPPAA was unconstitutional under the fifth amendment to the Constitution of the United States. *Shelter Framing Corp. v. Carpenters Pension Trust for Southern California*, 543 F.Supp. 1234 (C.D. Cal. 1982), *aff'd*, 705 F.2d 1502 (9th Cir. 1983). In the same decision, the court of appeals reversed the trial court ruling in R.A. Gray & Company's ("Gray") case. G & R will therefore be substantially affected by the Court's ultimate decision in this case.

STATEMENT OF G & R'S CASE

The material facts underlying G & R's constitutional challenge to the imposition of withdrawal liability pursuant to MPPAA are undisputed. A stipulation in the trial court of pertinent facts is attached as an appendix.[1]

From October, 1972 through July 1, 1980, G & R was bound to a collective bargaining agreement with the United Brotherhood of Carpenters and Joiners of America ("union"), which required contributions to the Carpenters Pension Trust for Southern California ("CPT") at a specified rate for each hour worked by its employees. (App. at 1a, 2a) CPT was formed in 1959 pursuant to a trust agreement entered into between the union and several multiemployer associations. (App. at 1a) G & R has never been a member of any of those multiemployer associations. (App. at 5a-6a) G & R steadfastly abided by its collective bargaining agreement with the union and made all contractually required contributions to CPT. (App. at 5a)

At the time G & R entered into its collective bargaining relationship with the union, neither the Employee Retirement Income Security Act of

[1] "App." refers to the appendix to G & R's brief *amicus curiae*.

1974, 88 Stat. 829 (1974), 29 U.S.C. §§ 1001-1381 (1976) ("ERISA"), nor MPPAA was in effect.[2] At no time was G & R free to withdraw its participation in CPT at will. G & R could withdraw its participation in CPT only by giving timely notice of termination in accordance with the terms of the appropriate collective bargaining agreement (App. at 3a), and after satisfying its bargaining obligation under the National Labor Relations Act § 8(a)(5) and (d), 29 U.S.C. § 158(a)(5) and (d) (1976), as amended.[3]

ERISA was passed in 1974. Under ERISA, a termination insurance program was established to be administered by PBGC. Under that plan, certain benefits were to be guaranteed by PBGC if the assets of the terminated plan were insufficient to fully fund those benefits. *See* ERISA § 4022, 29 U.S.C. § 1322 (1976). An employer could withdraw from a pension plan without incurring any continuing obligation to that plan so long as the plan did not terminate within five years subsequent to withdrawal. Even then, a withdrawn employer was only required to reimburse PBGC for amounts it had to pay under the benefit guaranty provisions of ERISA. These guaranteed amounts did not necessarily reach the full extent of the pension promises made by the pension plan. A withdrawn employer's liability was further limited to thirty percent of its net worth.

ERISA had no retroactive application. The major provisions of that law took effect on September 2, 1974, its enactment date. ERISA § 4201, 29 U.S.C. § 1381 (1976). Although ERISA was concerned chiefly with protecting the employees' pension expectations, it also realized that employers could not create, maintain, or expand pension plans if the

[2]"MPPAA §" refers to sections of ERISA as amended by MPPAA. "ERISA §" refers to provisions of ERISA prior to the passage of MPPAA. "PBGC brief" refers to Pension Benefit Guaranty Corporation's brief on the merits in these cases. "Carpenters' Pension Fund brief" refers to the brief on the merits of the Oregon-Washington Carpenters-Employers Pension Trust Fund.

[3]The withdrawal liability provisions of MPPAA are triggered when a participating employer ceases to have an obligation to contribute to a multiemployer pension plan. *See* MPPAA § 4203, 29 U.S.C. § 1383 (Supp. V 1981). The Court will note that the term "obligation to contribute" under MPPAA means an obligation arising (1) "under one or more collective bargaining (or related) agreements" or (2) "as a result of a duty under applicable labor-management relations law. . . ." MPPAA § 4212(a), 29 U.S.C. § 1392(a) (Supp. V 1981). An employer's obligation to continue to make trust fund contributions, including pension contributions, until it has satisfied its statutory bargaining obligation despite the expiration of its collective bargaining agreement is well established. *E.g.*, *Peerless Roofing Co. v. NLRB*, 641 F.2d 734, 736 (9th Cir. 1981).

costs imposed by ERISA were too high. Thus, ERISA contained many provisions which were designed to ameliorate the hardship to employers which included:

(1) A ceiling on an employer's liability at thirty percent of its net worth, ERISA § 4062(b)(2), 29 U.S.C. § 1362(b)(2) (1976);
(2) A limitation on the amount of benefits which PBGC would guarantee, ERISA § 4022(b)(3), 29 U.S.C. § 1322(b)(3) (1976);
(3) A phase-in of the amount of benefits to be guaranteed from plan amendments, ERISA § 4022(b)(8), 29 U.S.C. § 1322(b)(8) (1976);
(4) An authorization to PBGC to offer insurance to employers against contingent withdrawal liability with low insurance premiums, ERISA §§ 4006 and 4023(a), 29 U.S.C. §§ 1306 and 1323(a) (1976); and
(5) A grant of authority to PBGC to waive or reduce the liability imposed under the termination insurance provisions of ERISA during the first nine months after ERISA's effective date to avoid unreasonable business hardship "in any case in which the employer was not able, as a practical matter, to continue the plan," ERISA § 4004(f), 29 U.S.C. § 1304(f) (1976).

The termination insurance provisions of ERISA did not apply to multiemployer pension plans until August 1, 1980. Pub.L.No. 96-293, 94 Stat. 610 (June 30, 1980). *See* PBGC brief at 6 n. 6, 12.

After ERISA's passage, the trust agreement establishing CPT was revised. The trust agreement, in pertinent part, guaranteed employers that they would not be liable or responsible for any debts, liabilities or obligations of CPT or its trustees, and it expressly limited the employer's financial obligation:

> [T]o the payments required by the collective bargaining agreement with respect to his or its individual or joint venture operation, and . . . Individual Employers shall not be required to make any further payments or Contributions to the cost or operation of the fund or the pension plan except as may hereinafter be provided in the Collective Bargaining Agreements.

The last collective bargaining agreement to which G & R was signatory expired July 1, 1980. (App. at 3a) That agreement required that

notice to terminate be given at least sixty days prior to June 15, 1980, or no later than April 15, 1980. (App. at 3a) Like the trust agreement, the collective bargaining agreement provided:

> The parties recognize and agree that the Pension Trust was created, negotiated and shall continue to be a defined contribution plan and trust and that the individual Contractor's liability with regard to pensions has been and remains limited exclusively to payment of the contributions specified from time to time in collective bargaining agreements.

Pension benefit levels are determined solely by the trustees of CPT. At no material time has any shareholder, officer, director, agent or representative of G & R participated in: (a) investment decisions pertaining to any assets of CPT; (b) decisions of CPT to raise pension benefit levels; (c) decisions affecting CPT's administrative costs; or (d) the selection of actuarial assumptions or methods or accounting principles with which G & R's asserted withdrawal liability has been calculated. (App. at 5a) As a matter of law, the CPT trustees' sole obligation is to the beneficiaries of the pension fund and that obligation is a fiduciary one. *See NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981).

On or about April 8, 1980, G & R sent the union a notice to terminate its collective bargaining agreement. (App. at 3a) G & R's agreement expired effective July 1, 1980. After an impasse in negotiations was reached on July 18, 1980, G & R ceased having an obligation to contribute to CPT. (*Id.*)

At that time, Congress was in a state of utter confusion about the legislative bill which became MPPAA. As late as August, 1980, after G & R had withdrawn, one Senator lamented: "There are few, if any, members of the House or Senate who can confidently state how this bill will operate." 126 Cong.Rec. S10520 (daily ed. August 1, 1980) (statement of Sen. Durenberger) (App. at 11a). During the month of July, 1980, after the expiration of G & R's collective bargaining agreement, numerous and significant changes were made in MPPAA. 126 Cong. Rec. S10167 (daily ed. July 29, 1980) (statement of Sen. Armstrong) (App. at 8a-11a).

If MPPAA had been in effect at the date of its withdrawal, the record shows that G & R would have exercised several options which would have avoided or substantially reduced its withdrawal liability exposure. Those alternatives included selling its business or going out of business entirely.

MPPAA was enacted on September 26, 1980, after G & R ceased having an obligation to contribute to CPT. The withdrawal liability provisions of MPPAA were made retroactive to withdrawals which occurred on or after April 29, 1980. MPPAA § 4402(e)(2)(A), 29 U.S.C. § 1461(e)(2)(A) (Supp. V 1981). When originally introduced in February, 1979, the bill which became MPPAA was to have an effective date of February 27, 1979. The effective date of the withdrawal liability provisions was delayed solely in response to strong political pressures exerted by certain unidentified employers who were caught by the earlier date. Congress recognized, however, that permitting those employers to avoid withdrawal liability served to increase the burden placed upon remaining employers. 126 Cong.Rec. S10101, 10157 (daily ed. July 29, 1980) (statements of Sen. Javits and Sen. Matsunaga) (App. at 7a, 8a).

On or about September 2, 1981, CPT notified G & R of the amount of its withdrawal liability assessment and demanded payment in accordance with a prescribed schedule. (App. at 3a-4a) G & R's withdrawal liability was computed pursuant to MPPAA § 4211(b)(1)(B) and (3), 29 U.S.C. § 1391(b)(1)(B) and (3) (Supp. V 1981), which was the same method used to compute Gray's withdrawal liability.

With regard to withdrawal liability assessments, the term "unfunded vested benefits" is equivalent to the difference between the present value of the nonforfeitable benefits under the plan and the present value of the plan's assets. MPPAA § 4213(c), 29 U.S.C. § 1393(c) (Supp. V 1981). A "nonforfeitable benefit" is a benefit to which a participant (employee) is entitled to by virtue of having satisfied the requirements of the plan or of ERISA. MPPAA § 4001(a)(8), 29 U.S.C. 1301(a)(8) (Supp. V 1981).[4]

The total amount of G & R's withdrawal liability assessment is $687,387 (App. at 3a, 4a), which purportedly represents G & R's proportionate share of CPT's claimed unfunded vested liability as of December 31, 1979 in the amount of $282,854,000. The withdrawal liability claim

[4]Withdrawal liability is computed based upon the total vested pension entitlement of an employee under a pension plan. It is not computed from the level of benefits guaranteed by PBGC as under ERISA.

asserted against G & R is not based upon any claimed breach of a collective bargaining agreement. (App. at 5a) It is not based upon any need for payment of benefits to any particular present or former employee of G & R. The unfunded vested benefit liability has not been generated because of the retirement of any former or current employee of G & R. (*Id.*)

If CPT's claim were paid outright, MPPAA will have appropriated forty percent of G & R's net worth. If G & R elected to pay monthly installments of $17,397.83 as computed pursuant to MPPAA § 4219(c)(1)(C), 29 U.S.C. § 1399(c)(1)(C) (Supp. V 1981), MPPAA will have consumed ninety-four percent of G & R's net income for its fiscal year 1981.

Conversely, G & R's withdrawal liability assessment amounts to .00243 of CPT's claimed unfunded vested liability. CPT is in no danger of insolvency. *Shelter Framing Corp.*, 543 F.Supp. at 1250.

SUMMARY OF ARGUMENT

It is a rudimentary jurisprudential principle that laws are enacted for the future and do not operate on acts which predate their passage. This Court has never endorsed the application of the minimal, rational basis standard of judicial review in assessing the constitutionality of legislation which is retroactive either in its application or in effect. The appropriate standard of review to be employed in reviewing MPPAA's retroactive application to withdrawals which occurred prior to its date of enactment but subsequent to its retrospective effective date is that used by the Ninth Circuit -- whether MPPAA is applied retroactively was so wholly unexpected and disruptive that harsh and oppressive consequences followed. Applying this standard necessarily calls for the weighing of the withdrawn employers' reliance interests, the equities of imposing the additional unanticipated burden, and meaningful legislative efforts to soften the statute's impact.

Applying the correct standard of review to this case, MPPAA is unconstitutional. MPPAA nullifies the protection of limitation upon liability clauses in collective bargaining and trust agreements which were *encouraged* by ERISA to induce the creation and growth of pension plans. Its retroactive application obliterates withdrawn employers' reasonable reliance upon the state of the law at the time of withdrawal

which imposed no liability (only a possible contingent liability). They had no obligation to foresee MPPAA's final form.

No equitable considerations favor foisting massive and unforeseeable withdrawal liability upon employers who withdrew during the retrospective period. Employees had no reasonable expectation of continued funding of pension promises made by the pension trust funds from these employers as Gray and G & R explicitly disclaimed any obligation to fund the pension plans beyond the schedule of contributions required by the collective bargaining agreements. The total absence of meaningful moderating provisions in MPPAA demonstrates that there was no effort to soften MPPAA's impact in the area where the employer's element of reliance was greatest.

ARGUMENT

I

An Exposé of Fallacies Advanced by PBGC

PBGC has advanced several arguments which are intended to play upon this Court's sympathies in reviewing the constitutionality of the retroactive application of MPPAA. G & R will show that many of these contentions are deceptive and misleading.

1. Withdrawal liability is needed to assure that withdrawn employers continue to fund vested pension benefits earned by *their* employees.

PBGC has argued that withdrawal liability under MPPAA is needed to assure that employers who cease to participate in multiemployer pension plans continue to fund pension benefits earned by *their* employees. PBGC brief at 19, 30. This proposition is incorrect.

Both G & R (App. at 2a) and Gray are employers primarily engaged in the building and construction industry. The defendant multiemployer pension plans, CPT (App. at 1a) and Oregon-Washington Carpenters-Employers Pension Trust Fund ("Carpenters' Pension Fund"), primarily cover employees in the building and construction industry. G & R's and Gray's withdrawal liability assessments were, therefore, computed

pursuant to MPPAA § 4211(b), 29 U.S.C. § 1391(b) (Supp. V 1981). MPPAA § 4211(c)(1), 29 U.S.C. § 1391(c)(1) (Supp. V 1981).

Under Section 4211(b)(1), withdrawal liability is allocated based upon the withdrawn employer's proportionate share of the multiemployer pension plan's gross unfunded vested liability. Withdrawal liability is *not* necessarily computed based upon the retirement of any particular current or former employee of the withdrawn employer. Nor is it limited to the necessity to fund the vested pension rights of any current of former employee of the withdrawn employer. This point was conceded by CPT in the district court in the *G & R* case. (App. at 5a)

Under MPPAA, all the employers contributing to multiemployer pension plans are collectivized and treated as a single employer for purposes of funding a trust fund's vested pension obligations. Employers like G & R are required to fund the pensions of employees it never employed, to carry the burden of insolvent employers, to fund pension credits received by employees when contributions were not being made on their behalf (known as past service credits), and to assume a share of the unfunded liability directly attributable to the employees of employers who withdrew from the multiemployer pension plan prior to MPPAA's passage.[5]

PBGC's misleading description as to how withdrawal liability is allocated under MPPAA is more than a mere oversight. This Court in *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330, 355-61 (1935), invalidated similar provisions of the Railroad Retirement Act, finding them to be inconsistent with the fifth amendment's due process

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[5]Although not at issue here, one element of the withdrawal liability computation is a withdrawn employer's proportionate share of the unamortized amount of reallocated unfunded vested benefits. MPPAA § 4211(b)(1)(C), 29 U.S.C. § 1391(b)(1)(C) (Supp. V 1981). Unfunded vested liability is reallocated when the pension plan determines that any amount assessable against another employer is uncollectible by reason of the operation of the bankruptcy laws or similar proceedings; or as a result of the operation of the *de minimis* rule [MPPAA § 4209, 29 U.S.C. § 1389 (Supp. V 1981)], the twenty year cap upon the payment of withdrawal liability [MPPAA § 4219(c)(1)(B), 29 U.S.C. § 1399(c)(1)(B) (Supp. V 1981)], the limitation on withdrawal liability assessments rising from a sale of the employer's assets or an employer's dissolution or liquidation [MPPAA § 4225, 29 U.S.C. § 1405 (Supp. V 1981)], or any other amount the trust fund determines to be uncollectible or unassessable for reasons not inconsistent with regulations yet to be prescribed by PBGC. MPPAA § 4211(b)(4)(B), 29 U.S.C. § 1391(b)(4)(B) (Supp. V 1981).

guarantee because they were "unreasonably and unconscionably burdensome and oppressive." *Id.* at 360.[6]

2. MPPAA's retroactive effective date was needed to prevent mass withdrawals.

It is argued throughout PBGC's brief that MPPAA's retroactive date of April 29, 1980 was necessary to prevent mass withdrawals from multiemployer pension plans while MPPAA was in its formative stages. PBGC brief at 11, 17, 30-31. PBGC's contention is incorrect.

The withdrawal liability provisions of MPPAA apply to multiemployer pension plans created pursuant to collective bargaining agreements. MPPAA § 4001(a)(3), 29 U.S.C. § 1301(a)(3) (Supp. V 1981). The collective bargaining agreement containing the obligation to contribute to a multiemployer pension plan cannot be terminated at will. *Shelter Framing Corp.*, 543 F.Supp. at 1254. Rather, notice of termination must be given in accordance with the termination provisions of the collective bargaining agreement and National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (1976), as amended. Upon termination after proper notice, an employer is not free to cease making pension contributions until after it has satisfied its statutory obligation to bargain and an impasse in negotiations has been reached. Mass withdrawals at will were impossible.

MPPAA's claimed deterrent effect, moreover, is irrelevant to assessing its constitutionality on due process grounds. In *Usury v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17-18 (1976), upon which both PBGC and the Carpenters' Pension Fund rely as dispositive authority, this Court stated that it would "hesitate to approve the retrospective imposition of liability on any theory of deterrence or blameworthiness." (citations omitted).

[6]Similar reason was employed in *Pension Benefit Guaranty Corp. v. Anthony Co.*, 537 F.Supp. 1048, 1053-57, *supplemented*, 542 F.Supp. 43 (N.D. Ill. 1983), to prevent PBGC from recovering vested but unfunded benefits from a parent corporation which acquired its interest before ERISA's effective date absent a showing of direct economic benefit to the parent company from pension plan underfunding.

3. Congress selected the April 29, 1980 retrospective date to insure fairness.

In an effort to rewrite MPPAA's legislative history, PBGC argues that Congress chose April 29, 1980 as the effective date for the imposition of withdrawal liability out of a sense of fairness. PBGC brief 11-12, 39. As originally proposed, MPPAA was to have a retroactive effective date of February 27, 1979. The date was moved to April 29, 1980 because of strong pressure from politically powerful employers who had been caught by that earlier retroactive date. The retroactive effective date was advanced even though the withdrawal liability attributable to those employers would be visited upon the employers remaining with the plans in question, which, to quote PBGC, "[was] the very harm the law was designed to prevent." PBGC brief at 19-20. 126 Cong.Rec. S10101, 10157 (daily ed. July 29, 1980) (statements of Sen. Javits and Sen. Matsunaga) (App. at 7a, 8a).

The legislative history referred to above illustrates why retroactive legislation is viewed with disdain. Retroactive laws may be passed with knowledge of the precise conditions under which they will apply and of the persons on whom will fall whatever burdens may be imposed. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv.L.Rev. 692, 693 (1960) ("*Hochman*"). While one may argue that the advancement of the retroactive effective date of MPPAA was simply the outcome of normal legislative processes, the arbitrary selection of April 29, 1980 as the retroactive effective date of MPPAA is not consistent with the constitutional limitations which stand as bulwarks against majoritarian influences. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943).

II

MPPAA's Retroactive Application Violates Due Process

1. The appropriate standard of review.

In finding that MPPAA's retroactive application to employers who withdrew from multiemployer pension plans prior to the statute's enactment date violated due process, the Ninth Circuit applied the rationality standard set forth in *Nachman v. Pension Benefit Guaranty Corp.*, 592 F.2d 947, 960 (7th Cir. 1979), *aff'd on statutory grounds only*, 446 U.S.

359 (1980), which tests whether a retroactive law is unduly harsh and oppressive based upon the weighing of several factors. The Fourth Circuit and the Seventh Circuit have also applied the *Nachman* standard in evaluating the constitutionality of MPPAA's retroactive application, although those courts found that MPPAA's retroactive application survived a due process attack. *Peick v. Pension Benefit Guaranty Corp.*, No. 82-2081 (7th Cir. Dec. 19, 1983); *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F.2d 628 (4th Cir. 1983).[7]

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[7]In *Peick*, the court applied the "arbitrary and irrational" standard of review under *Turner Elkhorn Mining Co.* to a due process challenge to MPPAA's prospective operation, finding that the *Nachman* approach presented a more heightened level of judicial scrutiny. *Peick, slip op.* at 27-31. But in evaluating the constitutionality of MPPAA's retroactive application, the court recognized that a different standard of review was required, again based upon this Court's *Turner Elkhorn Mining Co.* decision, which examines whether the imposition of liability during the retroactive period was harsh or oppressive. *Id., slip op.* at 38-39; *accord Shelter Framing Corp.*, 705 F.2d at 1510. The Seventh Circuit specifically recognized that this heightened level of scrutiny approached the type of analysis utilized in *Nachman*. *Id., slip op.* at 39 n. 25. Thus, all of the courts of appeals which have considered the constitutionality of MPPAA's retroactive application have rejected PBGC's and the Carpenters' Pension Fund's assertion that rationality is to be tested by the traditional due process analysis applied to prospective legislation. PBGC brief at 20-23; Carpenters' Pension Fund brief at 20-22 & n.4.

The precedential value of *Republic Industries, Inc.* and *Peick* is doubtful. In *Republic Industries, Inc.* the withdrawal liability assessed relates to the closing of a terminal which the company contends occurred prior to MPPAA's effective date of April 29, 1980. *Republic Industries, Inc.*, 718 F.2d at 633-34. Under MPPAA § 4217(a)(2), 29 U.S.C. § 1397(a)(2) (Supp. V 1981), a "facility" at which all covered operations permanently cease before April 29, 1980, or for which there was a permanent cessation of the obligation to contribution to a multiemployer pension plan before that date, is not taken into account in assessing complete or partial withdrawal liability. The employer thus has a complete statutory defense to the imposition of withdrawal liability. Under the cardinal principal that courts should not pass upon questions of constitutionality where a statutory question might be dispositive, the Fourth Circuit should not have considered the challenge to the retroactive application of MPPAA prior to resolving the statutory claim. *E.g.*, *New York Transit Authority v. Beazer*, 440 U.S. 568, 582 (1979).

Curiously, the Seventh Circuit in *Peick* relies heavily upon the *Republic Industries, Inc.* decision even though it refused to consider the constitutionality of MPPAA in a case decided on the same day as *Peick* because nonconstitutional issues may have been dispositive. *Transport Motor Express, Inc. v. Central States, Southeast and Southwest Areas Pension Fund*, No. 83-2026 (7th Cir. Dec. 19, 1983). The Court explicitly recognized that its *Transport Motor Express, Inc.* decision conflicts with the Fourth Circuit's decision in *Republic Industries, Inc. Id., slip op.* at 6 n.3. Similarly, in *Peick*, there is substantial doubt as to whether there exists a justiciable challenge to the constitutionality of MPPAA, rendering the Seventh Circuit's decision nothing more than an advisory opinion. *Peick, slip op.* at 56-59 (Eschbach, J., dissenting).

PBGC implicitly and the Carpenters' Pension Fund explicitly (Carpenters' Pension Fund brief at 22 n.4) reject *Nachman* as controlling authority. This is not, however, the position taken by PBGC and the Carpenters' Penion Fund before the Ninth Circuit. Both argued that *Nachman* articulated the proper standard for assessing the rationality of MPPAA's retroactive application. *See* Carpenters Trust Fund's brief to the Ninth Circuit in Case No. 82-3506 at 12 and PBGC's brief to the Ninth Circuit in Case No. 82-3506 at 3-9. PBGC, in fact, argued that this Court had endorsed the *Nachman* rational *sub silentio* when it reviewed the *Nachman* decision on statutory grounds only. *Id.* at 4 n.4.

It is not surprising that PBGC and the Carpenters' Pension Fund are trying to place distance between *Nachman* and their arguments. The *Nachman* standard is derived from prior decisions of this Court applying the prohibition against statutes impairing the obligation of contracts under U.S. Const. art. I, § 10, cl. 1. As this Court, the Seventh Circuit in *Nachman*, and commentators have recognized, there is a tendency for decisions under the contract and the due process clauses to coalesce. Challenges under those limitations on legislative action can be analyzed under the standard of whether there has been a reasonable or unreasonable deprivation of property. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 & n.12 (1978); *Nachman*, 592 F.2d at 959; *Hochman*, 73 Harv.L.Rev. at 695; Hale, *The Supreme Court and the Contract Clause: III*, 57 Harv.L.Rev. 852, 890-91 (1944).

G & R agrees that *Nachman* factually has only limited application here. *See Shelter Framing Corp.*, 705 F.2d at 1511-12. Comparing ERISA as applied in *Nachman* to MPPAA as applied to these employers, however, serves to highlight the harsh and oppressive nature of the imposition of these massive unforeseeable monetary obligations.

In *Nachman*, the court assessed the constitutionality of ERISA's termination insurance program, the forerunner of withdrawal liability. The termination insurance provisions of ERISA applied prospectively only, although they served to nullify express limitations upon employer liability to contribute additional funding to underfunded pension plans. 592 F.2d at 958.

In Gray's case and in G & R's case, MPPAA not only has a retroactive effect of invalidating limitation upon liability clauses, but Congress has reached back to impose an unanticipated burden upon transactions which were completed prior to MPPAA's enactment. MPPAA's

retroactive effective date is a classic *ex post facto* law which would be facially unconstitutional but for this Court's 1798 decision in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798).

The bias against retroactive laws is an ancient one going back to the time of the ancient Greeks. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn.L.Rev. 775, 775-78 (1936) ("*Smead*").

> There are few principles of our law more ancient, and none more respected, than the canon which holds that laws are enacted for the future. A legislative pronouncement may not operate on acts which predate its passage.

South East Chicago Commission v. Department of Housing & Urban Development, 488 F.2d 1119, 1122 (7th Cir. 1973).

The most fundamental reason why retroactive legislation is suspect "stems from the principle that a person should be able to plan his conduct with reasonable certainty of the legal consequences." *Hochman*, 73 Harv.L.Rev. at 692. This principle is closely allied to the reasons why the Constitution places a high value on the protection of private contracts. "Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them." *Spannaus*, 438 U.S. at 245.

As discussed previously, another circumstance which clouds retroactive legislation is that such laws can be passed with knowledge of the precise conditions to which they will apply and of the persons on whom will fall the burdens they impose. A law for the future is impersonal; whereas a law for the past may be personal. Prospective legislation is better suited for an evenhanded and impartial administration of justice. *Hochman*, 73 Harv.L.Rev. at 693.

Despite PBGC's belabored effort to present a case for the minimal, rational basis standard, a careful review of the controlling authorities rational basis standard, a careful review of the controlling authorities confirms that judicial review of retroactive legislation is heightened. The appropriate standard is that which was employed by the Ninth Circuit; *i.e.*, whether the retroactive law "is so wholly unexpected and disruptive that harsh and oppressive consequences follow." *Shelter Framing*

Corp., 705 F.2d 1510 (quoting *Hazelwood Chronic Convalescent Hospitals, Inc. v. Weinberger*, 543 F.2d 703, 708 (9th Cir. 1976), *vacated on other grounds*, 530 U.S. 952 (1977)); *accord Welch v. Henry*, 305 U.S. 134, 147 (1938); *Spannaus*, 438 U.S. at 245 ("The severity of the impairment measures the height of the hurdle the . . . legislation must clear"); *Peick, slip op.* at 38; *Hochman*, 73 Harv.L.Rev. at 706.

This standard which tests the strength of the reliance interest ("wholly unexpected") and the severity of its impact ("harsh and oppressive consequences") necessarily subsumes the *Nachman* factors. Because the backdating of a statute is necessarily arbitrary and imposes a wholly unanticipated obligation depriving the persons affected of any meaningful opportunity to conform their conduct to the law's requirements, retroactively applied statutes are generally violative of due process. *E.g., Untermeyer v. Anderson*, 276 U.S. 440 (1928); *Blodgett v. Holden*, 275 U.S. 142 (1927), *modified*, 276 U.S. 594 (1928); *Forbes Pioneer Boat Line v. Board of Commissioners*, 258 U.S. 338 (1922).[8]

This rule is consistent with *Turner Elkhorn Mining Co.* While *Turner Elkhorn Mining Co.* reviewed prospective legislation having retroactive effects under a rationality standard, that standard was tempered with the caveat that retroactive legislation is subject to a higher standard of judicial review. 428 U.S. at 16-17. The justification for retrospective imposition of liability must take into account the possibility that the person affected may not hav been aware of the problem which prompted the passage of the legislation. Even if the person affected was aware of the problem, courts must consider whether the conduct may have been taken in reliance upon the state of the law at that time, which imposed no liability. *Id.* at 17; *Shelter Framing Corp.*, 705 F.2d at 1511. This aspect of *Turner Elkhorn Mining Co.* tests the strength of the reliance interest of the person affected by the retroctive legislation.

Turner Elkhorn Mining Co. also teaches that the equity of imposing the retroactive burden and any legislative efforts to moderate the impact of the unforeseen additional liability must be considered. There, the

[8]The only apparent exception to this rule is in the area of income taxation. As the *Shelter Framing Corp.* district court correctly analyzed, income tax statutes in this area are *sui generis*. 543 F.Supp. at 1251-52; *accord Welch v. Henry*, 305 U.S. at 146-47; *Hochman*, 73 Harv.L.Rev. at 706; *Smead*, 20 Minn.L.Rev. at 796. As this Court explained in *U.S. v. Darusmont*, 449 U.S. 292, 297-98 (1981) (*per curiam*), taxation is neither a penalty on the taxpayer nor a liability assumed by contract.

Court sustained the constitutionality of a statute requiring companies to pay black lung benefits to their employees who had left the industry prior to its enactment. The Court found that the imposition of liability was a "rational measure to spread the cost of the employees' disabilities to those who have profited from the fruits of their labor -- the operators and the coal consumers." *Id.* at 18. The Court distinguished *Alton* on the basis that the black lung benefit provisions did not simply increase or supplement a former employee's salary to meet his generalized need for funds. The statute was upheld because its purpose was to satisfy a specific need created "by the dangerous conditions under which the former employee labored to allocate to the mine operator an actual, measurable cost of his business." *Id.* at 19.

The Court was also influenced by the fact that a substantial portion of the burden for black lung benefits stemming from the period prior to the statute's enactment was borne by the government, which of course moderated the statute's retroactive impact upon the mine operators. *Id.* at 18; *Shelter Framing Corp.*, 543 F.Supp. at 1253.[9]

The federal Coal Mine Health and Safety Act was enacted on December 30, 1969, and provided in part for the payment of benefits to miners afflicted with irreversable black lung disease and their survivors. Claims filed under that statute between December 30, 1969 and June 30, 1973 were paid by the United States. Claims filed after December 31, 1973 were paid by the mine operator. Claims filed between July 1, and December 31, 1973 were adjudicated by the Secretary of Labor with the United States being responsible for the payment of any benefits until December 31, 1973. 428 U.S. at 12-13.[10]

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[9]In fact, some of the parties contended that it was likely that the mine operators would not be liable for any disabilities maturing before the statute's enactment. *See id.* at 16 n.14.

[10]The factors which lead the Court to uphold the statute in *Turner Elkhorn Mining Co.* are not significantly different from the *Nachman* factors. The factor which tests whether the impairment of the private interest is affected in an area previously subjected to regulatory control is merely another element of testing the strength of the reliance interest. *Shelter Framing Corp.*, 705 F.2d at 1512; *accord* Carpenters' Pension Fund brief at 21. When dealing with a retroactively applied statute, the fact that the parties may have been doing business in an area subject to federal regulatory control is of little significance. The plaintiffs in these cases had an absolute right to rely upon the state of the law at the time they withdrew from multiemployer pension plans and had no obligation to foresee the outcome of the formative legislation which became MPPAA. *Infra* at 22-28; 705 F.2d at 1511.

The dissenting opinion in *Spannaus* is also instructive in assessing this Court's attitude toward retrospective legislation. The dissenting justices reached the question of whether the Minnesota statute at issue there violated due process.

Briefly, in *Spannaus*, a majority of the Court struck down a Minnesota statute which, like MPPAA, retroactively imposed minimum funding and vesting standards on certain pension plans and held the employers to account for any fund deficiencies upon termination of the plan. The statute was held to be unconstitutional under the contract clause although the employer did not decide to terminate operations in Minnesota, which triggered the liability, until after the statute was passed. 438 U.S. at 238-39. The pension plan at issue in *Spannaus* was a single employer plan, and was not created pursuant to any collective bargaining agreement. *Id.* at 236 & n.2.

Dissenting Justices Brennan, White, and Marshall found that the contract clause was inapplicable. *Id.* at 255-62. The dissenting justices also found that the Minnesota statute did not violate the due process clause of the fourteenth amendment, relying primarily upon *Turner Elkhorn Mining Co. Id.* at 262-64. Particular emphasis was placed upon the fact that the Minnesota statute did not impose a sudden and unanticipated liability because the Act operated prospectively to plant closures which occurred after the statute's enactment date. This enabled the employer to give full consideration to the economic consequences of the decision. *Id.* at 254, 264. From an equitable perspective, the dissent was also concerned about the possible windfall from the use of surplus contributions for employees whose pensions had not vested to offset future contributions for employees whose pensions had vested. *Id.*

2. Applying the appropriate standard of judicial review, MPPAA's retroactive application violates due process.

Applying the factors discussed above, MPPAA is unduly harsh and oppressive. There are two elements to Gray's and G & R's reliance -- the state of the law and the limitation upon liability clauses. As this Court has already recognized, the element of reliance when funding a pension plan is vital. *Spannaus*, 438 U.S. at 246-47 (quoting *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702, 721 (1978)).

There was no showing in G & R's case that G & R was aware that its pension trust fund contributions since October, 1972 had been insufficient to fully fund CPT's vested pension obligations. On the contrary, the pertinent collective bargaining agreements to which G & R was signatory and the public records filed by CPT with the Internal Revenue Service as late as July, 1980 described CPT as a defined *contribution* plan to which neither the termination insurance provisions of ERISA nor the withdrawal liability provisions of MPPAA apply. ERISA § 4021(b), 29 U.S.C. § 1321(b) (1976). CPT further admitted in the district court that it never advised contributing employers that it was a defined benefit plan to which the termination insurance provisions of ERISA and the withdrawal liability provisions of MPPAA would apply. In any event, at the time of its withdrawal, G & R was subject to at most a thirty percent contingent liability based upon the level of benefits guaranteed by PBGC.[11]

Prior to ERISA's passage, limitation upon liability clauses presented an absolute bar to the recovery of additional contributions beyond those required to be made under a collective bargaining agreement, even if a pension plan was terminated with insufficient assets to fund pensions earned. *United Steelworkers of America v. Crane Co.*, 605 F.2d 714, 717-19 (3rd Cir. 1974). After the passage of ERISA, limitations upon liability clauses still protected employers from additional funding obligations upon withdrawal except where PBGC guaranteed certain benefit levels under terminated or insolvent plans within five years of the withdrawal. *See Murphy v. Heppenstall Co.*, 635 F.2d 233, 237-39 (3rd Cir. 1980), *cert. denied*, 454 U.S. 1142 (1982).

Assuming that G & R or Gray were aware that the plans were underfunded, they reasonably relied upon the state of the law in making the business decision to withdraw from the multiemployer pension plan. In G & R's case, ERISA imposed no immediate obligation to fund CPT as CPT was not insolvent and was not in danger of termination. ERISA did not intend to outlaw the limitation upon liability clauses. As this Court noted in *Nachman v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 385

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[11]In Gray's case, the date of withdrawal is pinpointed as June 1, 1980. Carpenters' Pension Fund brief at 4-5. As PBGC concedes, the mandatory termination insurance provisions of ERISA did not apply to multiemployer pension plans until August 1, 1980. PBGC brief at 6 n.6. It can be argued that the disclaimer of liability clause rendered Gray's potential liability doubly contingent. The pension plan had to terminate within five years of Gray's withdrawal and PBGC had to exercise its discretion to guarantee a portion of the unfunded liability.

n.35 (1980), "since [the use of limitation upon liability clauses] has unquestionably contributed to the growth of private pension plans, their prohibition would be inconsistent with Congress' repeated expressed intent to encourage the maintenance of pension plans." The disclaimer of liability clauses together with the thirty percent limitation upon the amount of liability collectible from an employer (along with other measures) soften ERISA's impact so as to encourage the creation and growth of such plans. *Nachman*, 446 U.S. at 380 n.30.

To allow MPPAA to now nullify the expectations created by ERISA that disclaimer of liability clauses would be respected and that an employer's potential liability to the pension plan would be limited to thirty percent of its net worth would be pernicious and arbitrary. "Wherever expectations have been raised in accordance with a declared purpose and concession of the state, . . . to disappoint those expectations by recall of the concession without a manifest preponderance of general utility is . . . pernicious." Smith, *Retroactive Laws and Vested Rights*, 6 Tex.L.Rev. 409, 427-28 (1928) (quoting 2 Austin, *Jurisprudence* § 1138 (1874)).

If G & R had known tht ERISA intended to nullify the limitation upon liability clauses beyond its original thirty percent contingent liability, G & R and other contributing employers could have: (1) not agreed to participate in CPT at all, (2) created a defined contribution plan (which was the party's intention under the pertinent collective bargaining agreements), or (3) attempt to confine narrowly the trustees' ability to set benefit levels higher than the value of the plan's assets. If MPPAA had been in effect at the time G & R withdrew, G & R could have sold its business to an employer who continued to contribute to CPT or G & R could have gone out of business completely, thereby incurring no withdrawal liability. *Shelter Framing Corp.*, 705 F.2d at 1511-12, 1514.

The equities and the lack of moderating features applicable to employers who withdrew during the retrospective period also argue against MPPAA's constitutionality. It is patently inequitable to impose an unanticipated and harsh liability upon a transaction which was completed prior to the passage of MPPAA. This is particularly true when viewed in light of the fact that the retroactive application of MPPAA was not necessary to forestall withdrawals and in light of the fact that the selection of April 29, 1980 as the effective date was purely arbitrary to mollify the interests of the politically powerful.

The inequity of imposing this harsh retroactive liability is further increased in that the employees could not justifiably rely upon G & R or Gray to provide additional funding for pensions. PBGC and the Carpenters' Pension Fund can point to no contractual provision which creates any expectation in the employees that employers such as G & R or Gray would continue to fund pensions. They agreed only to make pension contributions on behalf of their employees at specified hourly rates. G & R did not set the benefit levels. Those benefit levels were set by CPT. It was CPT, not G & R, who made promises of pension benefits at certain specified levels. *Shelter Framing Corp.*, 543 F.Supp. at 1250, 1252; *see Peick, slip op.* at 11. The bifurcation of the functions between contribution-setting and benefit-setting, together with the pension plan's ability to grant past service pension credits, are among the factors which account for and contribute to the creation of unfunded vested benefits. *See* 126 Cong.Rec. H7903 (daily ed. Aug. 26, 1980) (statement of Rep. Erlenborn); 126 Cong.Rec. S10103 (daily ed. July 29, 1980) (statement of Sen. Dole) (App. at 7a-8a, 11a-12a). Any employee's expectation of continued funding of pension promises was inextricably intertwined with the limitation upon liability clauses, thus foreclosing any reasonable expectation that he would receive more from participating employers.

These cases are strikingly similar to *Alton*, where the Court struck down a federal statute which created a compulsory multiemployer pension system for railroad employees. The Court unanimously held that the retroactive application of that statute to employees who had left the industry prior to its enactment violated due process. 295 U.S. at 348-50; *id.* at 389 (Hughes, C.J., dissenting). Like *Alton*, and unlike *Turner Elkhorn Mining Co.*, the provisions of MPPAA are designed to supplement an employee's generalized need for funds out of the assets of G & R even though G & R may never have employed the employee. If CPT were fully funded as represented to G & R through the trust agreements and the collective bargaining agreements, CPT could not make any claim for additional contributions from G & R because of G & R's withdrawal. It is only because CPT has made unauthorized promises which it apparently cannot keep that a claim for additional contributions has been made as authorized by MPPAA.

MPPAA is also devoid of any meaningful moderating features to lessen the harsh impact of MPPAA's retroactive application.[12] The

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[12]The Seventh Circuit has recognized that a case can be made for the inadequacy of moderating provisions of MPPAA as retroactively applied. *Peick, slip op.* at 49.

district court decision in *Peick* listed several features of MPPAA which it considered to moderate the impact of that statute upon withdrawn employers. 539 F.Supp. at 1049-52.

Four aspects of MPPAA listed were not available to G & R because of its pre-enactment withdrawal. The withdrawal liability payment funds under MPPAA § 4223(c)(1)(C), 29 U.S.C. § 1403(c)(1)(C) (Supp. V 1981) and MPPAA § 4222, 29 U.S.C. § 1402 (Supp. V 1981), were not in effect when G & R withdrew. The liquidation or dissolution rules under MPPAA § 4225(b), 29 U.S.C. § 1405(b) (Supp. V 1981); the modified definition of withdrawal as applied to the building and construction industry under MPPAA § 4203(b)(2), 29 U.S.C. § 1383(b)(2) (Supp. V 1981); and the sale of assets rule under MPPAA § 4204, 29 U.S.C. § 1384 (Supp. V 1981), were not known to G & R at the time it withdrew.

The fact that G & R can make monthly installments in excess of $17,000 as computed under MPPAA § 4219(c)(1)(C), 29 U.S.C. § 1399(c)(1)(C) (Supp. V 1981); and the fact that MPPAA puts a twenty-year cap on the amount of withdrawal liability which can be assessed does not moderate the impact of MPPAA as a practical matter.

The twenty-year cap is not only inapplicable to G & R, it is in the same category as the monthly installment payment provisions. Under MPPAA, G & R's annual payment equals $208,773.96, which is ninety-four percent of its income for fiscal year 1981. The twenty-year cap rule would provide relief to G & R only if the withdrawal liability assessment exceeded $4,175,479, more than twice G & R's 1981 net worth. *Shelter Framing Corp.*, 705 F.2d at 1514.

The *de minimis* rule, MPPAA § 4209, 29 U.S.C. § 1389 (Supp. V 1981), does not significantly moderate the impact of MPPAA. Because of the amount of withdrawal liability assessed against G & R, the *de minimis* rule has no application and thus cannot be considered. *Id.*

The ability to rejoin the pension plan under MPPAA § 4207, 29 U.S.C. § 1387 (Supp. V 1981), which was relied upon by the Seventh Circuit in *Peick, slip op.* at 40 n.26, is not a significant moderating feature. The ability to undo a transaction which was lawful and complete prior to the enactment of MPPAA is not a mitigating factor. *Shelter Framing Corp.*, 543 F.Supp. at 1254; *cf., Fuentes v. Shevin*, 507 U.S. 67, 80-81 (1972) (where this Court refused to embrace the proposition that a wrong can be done if it can be undone). Section 4207 requires PBGC regulations to implement that provision. Although more than three years has

elapsed since MPPAA was enacted, no such regulations have been issued by PBGC. *Shelter Framing Corp.*, 705 F.2d at 1514. Additionally, CPT had not promulgated any such rules at the time the district court entered its decision, nor had CPT set forth in the *G & R* record the terms and conditions under which G & R could rejoin the plan and to what extent its withdrawal liability would be abated or diminished. The moderating impact of this aspect of MPPAA is purely speculative; and in effect asks withdrawn employers to accept the proverbial "pig in a poke."

Despite the presence of the asserted mitigating features of MPPAA, a fact which cannot be ignored is that G & R has been assessed withdrawal liability in the amount of $687,387. G & R's withdrawal liability assessment consumes forty percent of its net worth and threatens the economic future of its business. Its withdrawal liability assessment has not been reduced by one cent through the operation of any of the moderating features discussed above. This fact demonstrates that MPPAA in its retroactive application is devoid of moderating features designed to eliminate or ameliorate the crippling effect of that statute.

3. No person can be required to predict the outcome of formative legislation.

Both PBGC and the Carpenters' Pension Fund assert that Gray could not reasonably rely upon the law in effect at the time of its withdrawal in evaluating the consequences of that business decision. They argue that the pendency of the legislative proposal which became MPPAA presented Gray with adequate notice of possible withdrawal liability. The question as to whether Gray or G & R were required to foresee and conform their business judgments to the outcome of pending legislation is the central issue in this case, as PBGC acknowledges. PBGC brief at 35.

The court of appeals decisions which have considered the constitutionality of MPPAA in its retroactive application have pivoted in large measure on whether the employer could reasonably rely upon the state of the law at the time of withdrawal. *Compare Shelter Framing Corp.*, 705 F.2d at 1511, with *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F.2d at 638, and *Peick v. Pension Benefit Guaranty Corp.*, *slip op.* at 39-40. The fact that the formative

legislation which became MPPAA was pending at the time of withdrawal is legally irrelevant to this Court's consideration of whether MPPAA's retroactive effective date passes constitutional muster. In *Untermeyer v. Anderson*, 276 U.S. at 445-46, this Court gave minimal consideration to this same argument and stated emphatically that there is no duty to foresee the outcome of pending legislative action.

> The mere fact that a gift was made while the bill containing the questioned provisions was in the last stage of progress through Congress we think is not enough to differentiate this cause from [*Blodgett v. Holden*] and to relieve the legislation of the *arbitrary character* there ascribed to it. To accept the contrary view would produce insuperable difficulties touching interpretation and practical application of the statute, and render impossible proper understanding of the burden intended to be imposed. The taxpayer may justly demand to know when and how he becomes liable for taxes -- he cannot foresee and ought not be required to guess the outcome of pending measures. The future of every bill brought before Congress is necessarily uncertain. The will of the lawmakers is not definitely expressed until final action thereon has been taken.

(emphasis added). *Untermeyer* remains good law to this day.[13]

This Court implicitly reaffirmed that basic jurisprudential principle in *U.S. v. Security Industrial Bank*, ____ U.S. ____, 51 U.S.L.W. 4007 (1982). In that case, this Court held that Section 522(f) of the Bankruptcy Reform Act of 1978 does not apply to nonpossessory, nonpurchase-money liens created prior to the statute's enactment date. *Id.* at 4010. There was substantial doubt as to whether the retroactive destruction of such liens would comport with the taking clause of the fifth amendment. *Id.* at 4009.

In *In re Gifford*, 688 F.2d 447 (7th Cir. 1982) (*en banc*), the Seventh Circuit upheld the constitutionality of Section 522(f) against a challenge

[13]PBGC's reliance upon *U.S. v. Darusmont* is misplaced. PBGC brief at 36. *Darusmont* upheld the retroactive application of federal income tax legislation, and distinguished *Untermeyer* on that basis. 449 U.S. at 299. As previously discussed, income tax legislation in this area is *sui generis*. *Supra* at 15 n.8.

to its constitutionality under the taking clause. In considering the statute's interference with reasonable investment-backed expectations, the Seventh Circuit found that the creditor's expectations were insignificant because (among other things) the creditor knew or should have known at the time the security interest was created "that Congress was in the process of amending the bankruptcy laws to permit avoidance of such security interests." Amendments to the bankruptcy act had been in the process of enactment for almost a decade. 688 F.2d at 458 & nn.13 & 14.

In *Security Industrial Bank*, neither the majority nor the concurring justices (who would have upheld the constitutionality of the statute if the Court was writing on a "clean slate," 51 U.S.L.W. at 4011 (Blackmun, J., concurring)) considered the pendency of the Bankruptcy Reform Act as a factor in assessing the strength of the creditor's property interest. The Seventh Circuit's *en banc* decision in *In re Gifford*, however, was before the Court. *See* 51 U.S.L.W. at 4008 n.4.

PBGC's and the Carpenters' Pension Fund's argument essentially seeks to have this Court adopt the old, but discarded, English common law doctrine of relation, which held that an act of Parliament took effect as of the beginning of the session in which it had been enacted. *See Smead*, 20 Minn.L.Rev. at 779. American law never adopted that common law principle. *Id.* at 781. In fact, the English common law rule was abandoned by an act of Parliament based upon the manifest injustices the application of that rule had inflicted. 33 Geo. III, ch. 13 (1793). *See also* 1 J. Kent, *Commentaries on American Law*, 454-59 (1836).[14]

As this Court's *Untermeyer* decision cogently observed, the imputation of legislative prescience will impose an intolerable burden. In this case, the employers would have had to conform their business behavior based upon what might have been the outcome of the legislative struggle over MPPAA's retroactive effective date. They would have had to foresee that MPPAA in its final form would provide a special withdrawal liability rule for employers engaged in the building and construction industry, allowing them to avoid withdrawal liability by going out of business. They would also have had to foresee that there would be special

[14]Kent complained that the American rule which holds that a statute takes effect as of the date of its enactment was unfair because "[i]t is impossible, in any state, and particularly in such a wide-spread dominion as the United States, to have notice of the law, until sometime after it has passed." *Id.* at 457-58.

withdrawal liability rules for employers who sold their business to companies which continued to participate in the multiemployer pension plans. This was impossible. *See Shelter Framing Corp.*, 705 F.3d at 1514.

At the time these employers withdrew not even the legislators themselves could have predicted MPPAA's final form, as the bill was undergoing numerous alterations. *Shelter Framing Corp.*, 705 F.2d at 1511. As one senator angrily complained:

> Mr. President, this is an extremely complicated piece of legislation. Every word of this bill is subject to interpretation by the IRS, the courts, the Department of Labor, and by hoards of lawyers in the private sector.
>
> On this bill rests the financial future not only of many of America's largest corporations and pension plans, but also of thousands upon thousands of American workers.
>
> And there is no committee report.
>
> I think it is irresponsible to those persons whose futures depend on this legislation for us to act without such a report.
>
> We almost passed this bill 30 days ago. Were it not for the quick action by some of my colleagues on this side of the aisle who put a hold on this bill, it might well have been passed 30 days ago as reported by the Labor Committee.
>
> Over the objections of the managers of the bill, a 30-day extension was sought and finally agreed to.
>
> I suppose it is a good thing that extension took place, since the managers of the bill have done much patchup work on it since then. Senators may not realize that this bill has been amended, altered, changed, and otherwise fiddled with no less than 335 times since it was reported out of the Labor Committee; 335 changes have been made in the bill that we almost passed 30 days ago.
>
> This is the bill that was not even available to be put in front of Senators around the markup table in the Labor Committee. The record shows that Senator Schweiker railed up and down about how silly it was to try to mark up a bill with less than one-half of it in front of him.
>
> Yet the markup pressed on, with Senator Schweiker being admonished about how hard staff had worked on the bill and about how every word had been gone over time

after time and that it was nearly perfect.

Nearly perfect except for the 335 changes that staff made in it in the past 30 days, that is. And I am told they have a raft of additional amendments today.

Where do these amendments come from? Well, certainly, several of them are quite technical in nature, only changing a word here or there, or, chaning an "and" to an "or" and such. In fact over 300 such little improvements were suggested by no less than the Pension Benefit Guaranty Corporation, the Internal Revenue Service, and the Treasury Department.

Mr. President, I wish only to make a simple point. The U.S. Senate can ill afford to legislate in this sloppy manner. No bill for markup. No committee report. No 3-day rule for Senators to consider this legislation.

We are constantly told, "Let staff handle this," or "Staff will study this and work out the details." Well, I am very happy that we have such an able staff working on this bill. It is a shame they cannot vote for it or against it, because they are about the only ones who know what is in it. It is also too bad that staff will not be held responsible by the pensioners if this bill does not work. But we know who will be held responsible.

We acted in a similar hurry-up manner when ERISA was passed in 1974. I was in the other body at the time, but I recall well the rush Congress was in to pass a law to protect pensioners from loss of their pensions.

Well, today we are scared to death at the possibility that the legislation might actually go into effect. It is so bad, so ill conceived as far as multiemployer plans go, that enactment of that legislation would bankrupt the system.

And yet, here we go again. Fumbling half blind through a bill.

How many Senators who are not on the Labor Committee or the Finance Committee have not had a chance to even see a clean copy of this bill yet, much less a committee report.

126 Cong.Rec. S10167 (daily ed. July 29, 1980) (statement of Sen. Armstrong); *accord* 126 Cong.Rec. S10520, 10561 (daily ed. Aug. 1, 1980) (statements of Sen. Durenberger and Sen. Jepsen); 126 Cong.Rec.

H6934, 6935 (daily ed. July 31, 1980) (statements of Rep. Frenzel and Rep. Rousselot) (App. at 8a-11a, 12a).

Even if one could divine the legislative twists and turns, there remains the imponderable element of presidential approval or disapproval. In this regard, the history of the Common Situs Picketing Bill, provides a striking example. Under that legislative proposal, building trades unions would have been entitled to picket an entire construction jobsite in protest of a dispute with a single contractor working at that site. The bill would have overruled legislatively this Court's longstanding decision in *NLRB v. Denver Building and Construction Trades Council*, 341 U.S. 675 (1951). While then President Ford had promised initially to sign the bill, he later changed his mind and vetoed the measure to the surprise of those who had felt that its passage was secured. *See Congressional Quarterly Weekly*, Vol. XXXIV, No. 3 at 82 (Jan. 17, 1976).

The practical implications of accepting PBGC's and the Carpenters' Pension Fund's argument are limitless, and if accepted by this Court will detrimentably alter the manner of doing business in this country. In the making of commercial transactions and business decisions the ability to rely upon the existing state of the law is paramount and compelling. This need complements the ultimate reason why retroactive legislation violates our sense of justice by depriving those affected with adequate and meaningful notice of the legal consequences of their actions. Applying this rule to the Bankruptcy Reform Act of 1978, transactions affected by bankruptcy laws would have remained unsettled for almost a decade while Congress decided how it was going to reform the Bankruptcy Code.

To protect their interests, all "prudent" employers will have to retain legislative advisors at the federal, state, and local levels to counsel them on pending legislative and administrative measures and the way in which they *might* affect their immediate business decisions if enacted and applied retroactively. Taking as an example the legislative activity during the first and second sessions of the Ninety-Sixth Congress, which spans the period of time that the proposed MPPAA was being considered, it can readily be seen that any rule which requires anyone to foresee the outcome of pending legislation is intolerable. During this period over 14,000 measures were introduced. Almost 3,000 measures were passed, which included over 500 public bills. Over 63,000 pages of the Congressional Record were generated, which does not include the numerous

committee reports prepared. 126 Cong.Rec. D1593 (daily ed. Dec. 30, 1980) (Résumé of Congressional Activity of the Ninety-Sixth Congress).

Considering the vast volume of legislation introduced at every level of government, this Court will succeed only in creating a new business endeavor for lawyers to act as legislative watchdogs; and legions of them will descend upon the seats of government to practice the mystical art of legislative forecasting.

CONCLUSION

Based upon the foregoing, the court of appeals decision must be affirmed.

Respectfully submitted,

MERRILL AND SCHULTZ,
A Law Corporation

Michael E. Merrill
Stephen J. Schultz
Mark T. Bennett

Attorneys for amicus curiae
G & R Roofing Co.

APPENDIX

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & R ROOFING COMPANY, a California corporation, Plaintiff, v. CARPENTERS PENSION TRUST FOR SOUTHERN CALIFORNIA, Defendant.	CASE NO. CV-81-5551-IH STIPULATION OF FACTS ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

The plaintiff and the defendant, through counsel, and pursuant to Local Rule 3.14, stipulate that there is no genuine issue of material fact with respect to the following:

1. G & R Roofing Company ("G & R") is a California corporation doing business within the Central District of California as a licensed construction contractor.

2. The Carpenters Pension Trust for Southern California ("CPT") is an express trust formed in 1959 pursuant to a trust agreement entered into between the United Brotherhood of Carpenters and Joiners of America ("union") and several multi-employer associations. CPT primarily covers employees in the building and construction industry.

3. CPT derives revenues from employer contributions made by contractors bound to collective bargaining agreements with the union. These collective bargaining agreements require signatory contractors to make contributions to the CPT for each hour worked by covered carpenter personnel.

4. Management of the assets of the trust and operation of the pension plan established by the CPT are entrusted to a board of trustees, half of whose members are appointed by the union and half of whose members are appointed by the multi-employer associations. At all

material times, the following individuals have been the union appointed trustees of CPT:

Paul Miller
John Ebert
Sam Heil
James W. Wood
Gerald T. Stedman

Each of the foregoing union-appointed trustees is an executive and/or an employee, and a member of either the Southern California Conference of Carpenters, one of the carpenters' district councils, or one of the carpenters' local unions, all of which are signatory to the 1977-1980 and 1980-1983 Carpenters' Master Labor Agreement.

At all material times, the following individuals have been the employer appointed trustees of CPT:

John W. Bernard
C.W. Driver
C.V. Holder
John H. Kuhl, III
Roy Silver

Each of the employer-appointed trustees is an executive officer and/or owner of a construction company which has been and is signatory to the 1977-1980 and 1980-1983 Carpenters' Master Labor Agreements by virtue of those companies' membership in one of the multi-employer associations which is signatory to the said master labor agreements.

5. Commencing in October, 1972, G & R was bound to a collective bargaining agreement with the union by virtue of having signed a memorandum agreement which incorporated the terms and provisions of the Carpenters' Master Labor Agreement negotiated from time to time. The terms of the collective bargaining agreement required, among other things, that G & R make contributions to CPT for each hour of covered work performed by carpenter personnel.

6. Substantially all of the employees with respect to which G & R had an obligation to contribute to CPT were performing work in the building and construction industry.

7. The most recent Carpenters' Master Labor Agreement to which G & R was bound (through its memorandum or "short form" agreement) required that notice to terminate or change said agreement must be given at least 60 days prior to June 15, 1980, or by no later than April 15, 1980.

8. On or about April 8, 1980, G & R sent the union a notice to terminate or change its collective bargaining agreement. G & R's agreement expired effective July 1, 1980.

9. G & R and the union negotiated on July 17 and 18, 1980, for the purpose of reaching a new collective bargaining agreement to succeed the collective bargaining agreement which terminated on July 1, 1980. On July 18, 1980, an impasse in negotiations was reached as the parties were unable to agree to a new collective bargaining agreement. As of July 18, 1980, G & R ceased having an obligation to contribute to CPT. The last pension contribution made by G & R to CPT was for work performed through August 12, 1980. G & R continued to employ persons after July 1, 1980 who performed, at least in part, work of the type covered by the expired memorandum or "short form" agreement, in the same geographic area previously covered by said agreement.

10. At all material times, CPT has claimed that it was under an obligation, pursuant to the provisions of Section 4202 of the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. Section 1382, to determine the amount of G & R's alleged withdrawal liability, to notify G & R of the amount of its alleged withdrawal liability, and to effect collection of the total withdrawal liability amount alleged to be due from G & R.

11. CPT has made a calculation of G & R's alleged withdrawal liability, and has determined that it is a sum not less than $687,387. G & R maintains that it has no legally enforceable obligation to pay withdrawal liability; and that in any event, G & R disputes the amount of alleged withdrawal liability calculated by CPT.

12. On or about September 2, 1981, CPT notified G & R of the amount of its alleged withdrawal liability and demanded payment thereof in accordance with a prescribed schedule. Said notification informed G & R of the total amount of its alleged withdrawal liability, and further notified G & R that it could elect to pay the total sum within 60 days in a single payment, or in the alternative, it must make monthly

installment payments for a period of 45 months. (A copy of the said September 2, 1981 notification from CPT to G & R is attached to the affidavit of Roderick R. Lopez offered in opposition to the motion for preliminary injunction, as Exhibit D).

13. The September 2, 1981 notification stated that monthly payments would be in the amount of $17,397.83 for 45 months, and a final payment of $1,922.53. Installment payments would total $784,824.88.

14. Following notification, G & R did not within 60 days thereafter make any installment payment or make the alternative lump sum payment of its total alleged withdrawal liability.

15. By service of the answer and counterclaim on November 12, 1981, CPT notified G & R that it was delinquent in making its monthly installment payment or the alternative lump sum payment, and notified G & R that if it failed to cure the delinquency within 60 days, G & R would be in default with regard to payment of its alleged withdrawal liability obligation, and that CPT was entitled to declare the entire amount of G & R's alleged withdrawal liability due and payable, as of the due date of the first payment not timely made.

16. CPT claims, subject to the preliminary injunction order, that there is due and owing and unpaid by G & R to CPT the total sum of $687,387, plus interest, liquidated damages of 20%, attorneys' fees and costs pursuant to Section 502(g)(2) of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. Section 1132(b)(2).

17. On December 10, 1981, CPT took the deposition of Greg VanDenBerg, the secretary/treasurer and sole stockholder of G & R. At that deposition, Mr. VanDenBerg produced, pursuant to the CPT's request, the financial statements of G & R for the fiscal year ending September 30, 1980 and for the fiscal year ending September 30, 1981. Those financial statements were made exhibits to the deposition, CPT's Exhibits 101 and 102.

18. The financial statement of G & R for the fiscal year ending September 30, 1980, shows a stockholder's equity in the total amount of $1,681,526, of which $169,129 is sums advanced from officers.

19. The financial statement for the fiscal year ending September 30, 1981, shows a stockholder's equity of $1,896,443 of which $163,802 is sums advanced from officers.

20. The September 30, 1981 financial statement shows a net profit for the fiscal year of $220,244.

21. The withdrawal liability claim of CPT against G & R is not based upon any contention that G & R has breached any prior collective bargaining agreement between G & R and the union.

22. CPT does not contend that the withdrawal liability claim of CPT against G & R has been generated or caused by the retirement of any particular current or former employee of G & R.

23. CPT does not contend that the withdrawal liability claim of CPT against G & R is based on the necessity for G & R to make any pension benefit contributions on behalf of any particular current or former employee of G & R. CPT does contend that its withdrawal liability claim against G & R is based upon provisions of the MPPAA.

24. No shareholder, officer, director, agent or representative of G & R has, during the period from 1972 to the present date, had any participation affecting:

(a) the investment decisions pertaining to any assets of CPT,

(b) the decisions of CPT to raise pension benefit levels,

(c) decisions affecting CPT's administrative costs, or

(d) the selection of actuarial assumptions or methods or accounting principles or methods upon which G & R's asserted withdrawal liability has been calculated.

CPT's decisions are made by its trustees in their sole discretion. The employer-appointed trustees are selected by members of the multi-employer associations which are signatory to the Carpenters' Master

Labor Agreement. At no time did G & R choose to apply for membership in or belong to any multi-employer association.

25. The collective bargaining agreements to which G & R was bound during the period from 1972 through July 1, 1980, did not guarantee or specify any certain pension benefit levels or payments for any qualified pension beneficiaries.

26. By entering into this stipulation, neither plaintiff or defendant waives the right to argue the relevancy of any of the foregoing stipulated facts.

MERRILL, SCHULTZ & HERSH
Attorneys for Plaintiff

DATED: February 16, 1982

By Michael E. Merrill
Michael E. Merrill

COX, CASTLE & NICHOLSON
Attorneys for Defendant

DATED: February 16, 1982

By James P. Watson, by [illegible] Schultz
James P. Watson

126 Cong. Rec. S10101 (daily ed. July 29, 1980)

Mr. Javits:

* * *

The effective date for the imposition of withdrawal liability is April 29, 1980. The committees decided in part to move up the date from February 27, 1979, the date contained in earlier versions of the bill, because the original purpose of a retroactive effective date--namely, to avoid encouragement of employer withdrawals while the bill was being considered--has been achieved. It should also be noted that the April 29 effective date is the product of strong political pressures by certain withdrawing employers who were caught by the earlier date. I realize that permitting these employers to avoid liability only increases the burdens of those employers remaining with the plans in question, but it appears necessary to accept the April 29 date in order to enact the bill before the August 1 deadline for action. That somewhat increases the burdens of those employers who remain; but it appears necessary to accept this April 29, 1980, date in order to enact the bill before the August 1 deadline for action, which we now face; and it applies, of course, only within the particular multiemployer plans to which it relates.

* * *

126 Cong. Rec. S10103 (daily ed. July 29, 1980)

Mr. Dole:

* * *

For this reason, S. 1076 would impose a liability where an employee ceases to make contributions to a plan. The amount of this liability is his share of the amount which is necessary to fund retirement benefits but which has not yet been contributed.

In a single employer plan, it is relatively easy to determine what an employer must contribute in order to fund the benefits he has promised to pay. This determination is not so easy to make for a multiemployer plan.

The problem with determining withdrawal liability under this bill is that each employer's share of the plan's unfunded liability includes the amount that is directly attributable to his employees, but also includes a share of the liabilities that cannot be attributed to any one employer. An example of this is the liability left when another employer becomes insolvent and ceases contributions.

Furthermore, under the collective bargaining process, employers commonly negotiate only the rate of their contributions not the amount of the retirement benefit that the plan's trustees promise employees will result from the employer's contribution. If the plan's actuary is overly optimistic, further unfunded liability results.

This Senator recognizes that in many multiemployer plans it is impossible to trace the unfunded liability attributable to each employer.

* * *

126 Cong. Rec. S10157 (daily ed. July 29, 1980)

Mr. Matsunaga:

* * *

As I stated earlier, this date was also recommended by the Senate Labor and Human Resources Committee, and the House Education and Labor Committee. The Finance Committee considered the legislation in April of this year. Owing to the efforts of powerful lobbyists, the Committee on Finance moved up the effective date to April 29, 1980.

* * *

126 Cong. Rec. S10167 (daily ed. July 29, 1980)

Mr. Armstrong:

* * *

Mr. President, this is an extremely complicated piece of legislation. Every word of this bill is subject to interpretation by the IRS, the courts, the Department of Labor, and by hoards of lawyers in the private sector.

On this bill rests the financial future not only of many of America's largest corporations and pension plans, but also of thousands upon thousands of American workers.

And there is no committee report.

I think it is irresponsible to those persons whose futures depend on this legislation for us to act without such a report.

We almost passed this bill 30 days ago. Were it not for the quick action by some of my colleagues on this side of the aisle who put a hold on this bill, it might well have been passed 30 days ago as reported by the Labor Committee.

Over the objections of the managers of the bill, a 30-day extension was sought and finally agreed to.

I suppose it is a good thing that extension took place, since the managers of the bill have done much patchup work on it since then. Senators may not realize that this bill has been amended, altered, changed, and otherwise fiddled with no less than 335 times since it was reported out of the Labor Committee; 335 changes have been made in the bill that we almost passed 30 days ago.

This is the bill that was not even available to be put in front of Senators around the markup table in the Labor Committee. The record shows that Senator Schweiker railed up and down about how silly it was to try to mark up a bill with less than one-half of it in front of him.

Yet the markup pressed on, with Senator Schweiker being admonished about how hard staff had worked on the bill and about how every word had been gone over time after time and that it was nearly perfect.

Nearly perfect except for the 335 changes that staff made in it in the past 30 days, that is. And I am told they have a raft of additional amendments today.

Where do these amendments come from? Well, certainly, several of them are quite technical in nature, only changing a word here or there, or, changing an "and" to an "or" and such. In fact over 300 such little improvements were suggested by no less than the Pension Benefit

Guaranty Corporation, the Internal Revenue Service, and the Treasury Department.

Mr. President, I wish only to make a simple point. The U.S. Senate can ill afford to legislate in this sloppy manner. No bill for markup. No committee report. No 3-day rule for Senators to consider this legislation.

We are constantly told, "Let staff handle this," or "Staff will study this and work out the details." Well, I am very happy that we have such an able staff working on this bill. It is a shame they cannot vote for it or against it, because they are about the only ones who know what is in it. It is also too bad that staff will not be held responsible by the pensioners if this bill does not work. But we know who will be held responsible.

We acted in a similar hurry-up manner when ERISA was passed in 1974. I was in the other body at the time, but I recall well the rush Congress was in to pass a law to protect pensioners from loss of their pensions.

Well, today we are scared to death at the possibility that the legislation might actually go into effect. It is so bad, so ill conceived as far as multiemployer plans go, that enactment of that legislation would bankrupt the system.

And yet, here we go again. Fumbling half blind through a bill.

How many Senators who are not on the Labor Committee or the Finance Committee have not had a chance to even see a clean copy of this bill yet, much less a committee report.

They will be expected to vote on this bill today, too.

Mr. President, I considered offering another 30-day extension in lieu of passing this bill today, but I decided not to do that. While the bill might be improved during this extra time, it also might get loaded down with even more additions and amendments than are in it already.

We need this bill badly. Mostly because we fouled up in 1974, but we still need it badly. But we have had plenty of time to get a clean copy of the bill and we have plenty of time to get a committee report published.

It is a bad way to do business. If business did business in this way there would not be anybody in business.

* * *

126 Cong. Rec. S10520 (daily ed. August 1, 1980)

Mr. Durenberger:

* * *

Mr. President, I would have preferred a sunset provision to a study on the effects of this bill. There are few, if any, Members in the House or Senate who can confidently state how the bill will operate.

* * *

126 Cong. Rec. S10561 (daily ed. August 1, 1980)

Mr. Jepsen:

* * *

Mr. President, on Tuesday evening, I voted against S. 1076, the Multiemployer Pension Plan Amendments Act of 1980. I did so for a number of reasons.

First, I felt that it was unreasonable for the Senate to have to vote on such complicated and far-reaching legislation without the benefit of a committee report or sufficient time for those of us who are not members of the committees with jursdiction to study the issues. I think that experience clearly shows that when Congress rushes through major legislation, bad laws inevitably results. A good example is carryover basis, which was tacked on to the Tax Reform Act of 1976 in the wee hours of the 94th Congress. The result is that the 96th Congress had to repeal this section of the bill.

* * *

126 Cong. Rec. H7903 (daily ed. August 26, 1980)

Mr. Erlenborn:

* * *

. . . gratuitous past service benefits for active participants which are related to years of service with an employer before the employer joined the plan should be excluded from the benefit guarantee. These benefits can create large unfunded liabilities and actually precipitate a plan's decline into insolvency.

* * *

126 Cong. Rec. H6934 (daily ed. July 31, 1980)

Mr. Frenzel:

* * *

I serve on one of the committees which has jurisdiction over these matters, but I have not had time to compare completely the remaining differences between the House and Senate. Any legislative body which tries to act blindly and with intemperate haste in this field will be likely to inflict grievous economic wounds on our society. I could not in good conscience agree to let this bill go forward in this manner.

* * *

126 Cong. Rec. H6935 (daily ed. July 31, 1980)

Mr. Rousselot:

* * *

Mr. Speaker, do I understand then that if there is an objection to this unanimous-consent request to proceed, as my colleague from Minnesota has indicated, with many aspects of this bill which even the people in this House are not totally familiar with, if there was such an objection we could go to a unanimous-consent request to take up the bill of the gentleman from Ohio, a member of the committee, to extend for 60 days the deadline; is that correct?

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